82-2067

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No. . .

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

ROBERT GALANTY,

Petitioner,

vs.

CHRYSLER CORPORATION and
ROSSMEYER BROTHERS, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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Question Presented

1. Whether or not the Magnuson-Moss Warranty Federal Trade Commission Improvement Act (hereinafter Magnuson-Moss), more specifically, 15 U.S.C. 2304(a)(4) creates an additional remedy separate and distinct from the relief available pursuant to the Uniform Commercial Code which is applicable to the case at bar?

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The Plaintiff has established a breach of federal minimum standards for warranties promulgated in 15 U.S.C. 2302, 3 and 4, thus permitting him to invoke the remedies set forth in 15 U.S.C. 2304(a)(4).

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OCTOBER TERM, 1983

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v.

CHRYSLER CORPORATION and
ROSSMEYER BROTHERS, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF NEW JERSEY,
APPELLATE DIVISION

The Petitioner, Robert Galanty, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Superior Court of New Jersey, Appellate Division, entered in this proceeding on March 11, 1982.

OPINIONS BELOW

The following opinions of the State Courts are reproduced in the appendix: the Order of the Supreme Court of New Jersey dated March 7, 1983 denying certification as improvidently granted, not yet reported; the Order of the Supreme Court of New Jersey dated September 30, 1982 granting certification; the opinion of the Superior Court of New Jersey, Appellate Division, dated March 11, 1982, unreported; and the Judgment of the Superior Court of New Jersey, Law Division, Middlesex County.

JURISDICTION

The Judgment of the Supreme Court of New Jersey was entered on March 7, 1983, and this petition for a Writ of Certiorari is being filed within 90 days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. sec. 1257(3).

STATUTORY PROVISIONS

15 U.S.C. 2304(a)(4) - Federal Minimum Standards for Warranties

> "If the product (or a component part thereof) contains a defect or malfunction after a reasonable number of attempts by the warrantor to remedy defects or malfunctions in such product, such warrantor must permit the consumer to elect either a refund for, or replacement without charge of, such product or a part, as the case may be . . ."

N.J.S.A. 12A:2-602

N.J.S.A. 12A:2-608(1)

N.J.S.A. 12A:2-719(2)

STATEMENT OF THE CASE

On September 1, 1976 Petitioner, Robert Galanty, purchased what was repre-

sented to be a brand new 1976 Chrysler Plymouth Sports Fury from Rossmeyer Brothers, a duly authorized Chrysler dealership whose principle place of business is Metuchen, New Jersey. The purchase price was $5,407.50. On the date of purchase, Petitioner Galanty asked to see the vehicle prior to consumating the sale, at which time he was told the vehicle was in the back of the showroom being prepped.

After signing the appropriate papers, Mr. Galanty was, for the first time, shown the vehicle. The car was fraught with paint and cosmetic defects, including nicks, dents and scratches. Petitioner Galanty immediately tendered the return of the vehicle and asked for his money back and explained the vehicle was in a defective condition. A closer look at the vehicle revealed broken glass, damaged trim and a

powdered spray covering the exterior of the vehicle.

Rossmeyer refused to accept the return of the vehicle for the purchase price. Petitioner had depleted his savings account, was earning only $10,000.00 a year and thus was forced to takepossession of the defective vehicle albeit under protest.

Upon driving the vehicle off the lot, the car stalled, bolts fell out from under the dashboard, and the brakes were grossly defective. Again Galanty sought to revoke acceptance, and again Rossmeyer refused. Within 48 hours of purchase, a radiator leak manifested itself. Subsequently, a transmission leak appeared.

Petitioner contracted for a twelve month expressed warranty and maintenance and repair. During the warranty period, Petitioner was forced to return the vehicle

to Rossmeyer twenty-five to thirty-five times to remedy the aforementioned problems. These efforts were to no avail. Thus effectively depriving him of the use and enjoyment of his vehicle. To the extent that repairs were made, they failed to meet Mr. Galanty's subjective requirements.

Petitioner Galanty filed suit in the Superior Court, Law Division, Middlesex County, on August 8, 1979. Petitioner essentially claimed that both Chrysler and Rossmeyer were in breach of their implied warranty of merchantability in that the vehicle was substantially impaired. Galanty further contended that there was a breach of the expressed warranty of maintenance and repair since Galanty was forced to repeatedly return the vehicle to effectuate the necessary changes.

Moreover, Galanty contended that the vehicle in question failed to comport with his subjective requirements and thus Chrysler and Rossmeyer were in breach of their expressed warranty of fitness. Galanty therefore sought to invoke the remedy specifically set forth in Magnuson-Moss 15 U.S.C. 2304(a)(4) return of the purchase of the vehicle and refund of the purchase price. Galanty sought to invoke this Federal remedy in addition to his contention that the vehicle was substantially impaired and that there was a breach of implied warranty of merchantability and thus sought to invoke a Federal remedy in addition to the State remedy of rejection and revocation (i.e. cancellation) and refund of the purchase price pursuant to N.J.S.A. 12A:2-608(1) and 12A:2-602.

At the conclusion of the plaintiff's case, and pursuant to defendants' motion for dismissal, the Court ruled the plaintiff had failed to make out a prima facie case on either Federal or State grounds.

The facts before the Appellate Division were those elicited at the trial which had already been summarized above. Finding no merit in Galanty's contentions, the Appellate Division affirmed in a per-duriam dated March 11, 1982. (Pa-1a)

Subsequently, the Supreme Court of New Jersey granted the Petition for Certification on all issues. (Pa-4a) At oral argument Petitioner contended that he had established a violation of both the UCC as codified in N.J.S.A. 12A:2-608(1); N.J.S.A. 12A:2-602 and the Magnuson-Moss Act, to wit, 15 U.S.C. 2301 et seq. After hearing oral argument the State

Supreme Court denied the Petition as improvidently granted one Justice dissenting. Specifically, the dissenting Justice articulated his view that the plaintiff had clearly established a claim for breach of warranty under 15 U.S.C. 2304(a)(4) permitting him to return the merchandise and receive a refund for the purchase price.

REASONS FOR GRANTING THE WRIT

THE PLAINTIFF HAS ESTABLISHED A BREACH OF FEDERAL MINIMUM STANDARDS FOR WARRANTIES PROMULGATED IN 15 U.S.C. 2302, 3 AND 4, THUS PERMITTING HIM TO INVOKE THE REMEDIES SET FORTH IN 15 U.S.C. 2304(a)(4).

A. Introduction

It is our contention that the Magnuson-Moss Warranty Federal Trade Commission Improvement Act (hereinafter Magnuson-

Moss) creates additional remedies separate and distinct from the UCC directly applicable to the case at bar. Petitioner Galanty submits that 15 U.S.C. 2304(a)(4) permits him to revoke acceptance and receive a return of the purchase price for any failure to meet any warranty specifications, notwithstanding the fact that the goods in question were not substantially impaired as that term is defined under State Law. It follows a fortiori that since Federal Magnuson-Moss creates a separate and distinct additional right independent thus giving rise to independent justification for Petitioner's relief, that the Federal question in the case at bar is not insignificant and unsubstantial. Compare Lamb Enterprises, Inc. vs. Kiroff N.D. Ohio (1975) 399 F. Supp. 409 rev'd on other grounds, 549

F2d. 1052 certiorari denied 431 U.S. 968.

In seeking a Writ of Certiorari, Petitioner asserts that this separate and Federal distinct right which permits invocation of the remedy of cancellation and return of the purchase price set forth in 15 U.S.C. 2304(a)(4) applies equally to the instant case, notwithstanding the fact that the remedy in question is limited rather than full. Petitioner's position has been succinctly stated by Justice O'Hern in his dissenting opinion wherein certification was denied as improvidently granted.

B. Argument

It is axiomatic that the UCC permits the right to revoke acceptance for a warranty breach which substantially impairs the value of the product in question. See

e.g. Mirrocco vs. Ford Motor Company, 66 N.J. 454 (1971); Sudol vs. Rudy Papa Motors, Inc., 175 N.J. Super. 238, 241 (1979). This right now known as the right of cancellation has been codified by the New Jersey Legislature, Ramirez vs. Auto Sport, 88 N.J. 277 (1982) N.J.S.A. 12A: 2-608(1):

> "Substantial impairment is an amorphis phrase which of course defies precise definition. A mere minor defect or deviation from perfection does not constitute substantial impairment." See e.g. Bergen Stock vs. Lemayis G.M.C., Inc. (1977)(R.I.)

In determining whether or not a vehicle has been substantially impaired, the Court must focus upon whether the particular non-conforming in the goods substantially limits its value. C.F. Seely vs. White Motor Company, 63 Cal. 2d. 945 (Sup. Ct. 1965). Where the buyer's con-

fidence in the product has been substantially shaken by the product's failure to perform, the goods are substantially impaired. Zabriskie Chevrolet vs. Smith, 99 N.J. Super. 441 (App. Div. 1968).

In Asciolla vs. Manter Oldsmobile Pontiac, Inc., 370 (A) 2d. 270, 273 (Sup. Ct. N.H. 1977) where a transmission defect arose within four weeks of purchase the New Hampshire Supreme Court embarked upon a detailed discussion of substantial impairment and made the following observations: Id.

> "Few items which are considered necessities occupy such a significant portion of an individual consumer's income as does a new automobile. Few purchases are made with more care and deliberation. The record indicates the plaintiff was a particularly prudent painstaking car buyer and that he had indeed once before refused to accept an automobile from the defendant which merely

> had a dented fender which had been repaired. Within three weeks of the purchase of the car issue in this case he found it to be totally inoperable."

Similarly in the case at bar, Petitioner Galanty was a particularly prudent buyer. It is our contention that Magnuson-Moss was enacted with the specific purpose of creating an additional and distinct right and remedy for the particularly prudent buyer notwithstanding the question of whether or not Asciolla's liberal construction of the term "substantial impairment" is binding as a matter of State Law. It is our position that Magnuson-Moss was designed to protect the particularly prudent buyer who is obviously wholly incapable of ferretting out latent defects prior to purchasing a product particularly one as complexed and which requires as substantial a financial investment as an

automobile.

It is not subject to dispute nor does Petitioner contend that the warranty in question in the case sub judice is anything but a limited warranty as that term is defined in Magnuson-Moss, to wit, 15 U.S.C. 2302(a)(2). Petitioner concedes that a perfunctory reading of Magnuson-Moss might lead one to the conclusion that the only protection afforded a limited warranty holder is that there could be no disclaimer of an implied warranty of merchantability. 15 U.S.C. 2308(a)(1). Moreover, it could be argued that 15 U.S.C. 2304(a)(4), which permits cancellation for any defect or deviation from the warranty even if the goods are not substantially impaired which on its face applies only to full warranties affords no protection whatsoever to Petitioner Galanty

save to protect him from an innocuous disclaimer of an implied warranty of merchantability.

It is our position the aforementioned reading of Magnuson-Moss flies in the face of logic and rudimentary principles of statutory construction. Moreover, such a niggardly interpretation of the Magnuson-Moss Act would frustrate the very purpose of the law which is to protect consumers who purchase goods on the open market place.

It is a fundamental principle of statutory construction the Courts must presume that the Legislature is aware of existing related laws. In re McDill Estate, 537 P.2d. 874, 22 Cal. Rptr. 754 (1975). Where the Legislative intent on a given subject is not clear on its face, the Legislature's purpose must be gleaned

from the entire context in light of "the mischief felt... and the intent is to be taken or presumed according to what is consonant with reason and good discretion." Noble vs. Glens Ferry Bank Limited, 421 P.2d 444, 91 Idaho 304 (1966).

It is always to be assumed that the public interest is favored over any private interest with an end towards a just and reasonable result. Conrad vs. City of Thorton, 536 P.2d. 855 (1976).

Application of the aforementioned principles leads to the inescapable conclusion that the purpose of the Magnuson-Moss Warranty Act as specificly set forth in 15 U.S.C. 2304(a)(4) is equally applicable to limited warranties. Limited warranties under Magnuson-Moss on its face protect consumers by precluding any limited warrantor from disclaiming an im-

plied warranty of merchantability. 15 U.S.C. 2308. Significantly, the Legislation is silent on the meaning and effect of limited warranties save for the aforementioned. It follows a fortiori the Court must engage in an exercise of statutory construction to interstitially fill the gaps left by Magnuson-Moss consonant with reason, fairness and the Legislative intent.

It is of course not subject to serious dispute that the purpose of the Magnuson-Moss Act is to prevent deception and instill confidence in prospective buyers that they will be protected from overbearing manufacturers and their agents. 15 U.S.C. 2302. Congress, no doubt, was aware that the UCC enacted in forty-nine states empowered a buyer, who purchased substantially impaired and otherwise unmer-

chantable goods, to cancel the contract and receive a refund of the purchase price. It follows *a fortiori* that Congress must have sought to provide additional protection and to fill the void left by the UCC under circumstances like the case *sub judice*. Assuming arguendo, that the vehicle in question was not substantially impaired after the defendant remedied the alleged defects, it is our position that the vehicle failed to meet Galanty's subjective requirements, and that, further, Galanty's confidence was erroded thus effectively depriving him of what he bargained for regardless of whether or not the vehicle was substantially impaired. We submit that in light of the aforementioned, Galanty has set forth a cause of action under 15 U.S.C. 2303(a)(4).

Indeed the salient distinctions between the UCC remedies and Magnuson-Moss

is succinctly set forth below:

> "A buyer who proves merely that he or she has tried a reasonable number of times to have a product fixed and that the product is still defective or malfunctioning has met all the preconditions for cancelling the sale and obtaining a refund (or replacement if preferred). The buyer need not show what the essential purpose of the stated remedy is, nor what facts constitute failure of that purpose. The statute in essence provides the purpose of the remedy is the provision of a defect-free functioning product and that the continued existence of a defect or malfunction after a reasonable number of repair attempts is a failure of that purpose.... Finally, the UCC right to revoke acceptance is available only where the breach 'substantially impairs the value' of the product of the buyer. Under the Magnuson-Moss provision, the buyer need not prove what is substantial impairment. This precondition was simply dropped and <u>any</u> failure to meet the warranty specifications justifies the extraordinary remedies of the 'remedy provision'". (15 U.S.C. 2304(a)(4) 13 UCC Law Journal, 21, 28 (1981).

The aforementioned interpretation of Magnuson-Moss makes eminently good sense when one carefully considers the evolution of the UCC in the area of consumer protection in many states. Indeed Magnuson-Moss constitutes the consumation of a substantial body of case law in many states which have expanded and liberalized the concepts of merchantability and substantial impairment under the UCC. Additionally, Magnuson-Moss is designed to protect consumers from manufacturers and dealers who previously were able to hide behind technical defenses and minimal standards of merchantability.

Prior to the enactment of Magnuson-Moss New Jersey had liberalized the definition of substantial impairment. In Zabriskie Chevrolet vs. Smith, supra, the Court held that a buyer's subjective dis-

satisfaction, if based upon any reasonable evidence that his confidence was ligitimately undermined by any defect in performance, could invoke the remedy of a cancellation set forth in N.J.S.A. 12A:2-608, notwithstanding the fact that from a purely objective point of view the vehicle was minimally operable and functional. Other Courts in interpreting the UCC have likewise given a liberal construction to the definition of substantial impairment when confronted with a buyer's subjective dissatisfaction concerning such a substantial investment as an automobile.

Indeed in Overland Board Investment Corporation vs. Howard, 9 Ill. App. Div. 3rd 348, 292 N.E. 2d 168 (1972) where plaintiff, a salesman who needed constant use of his vehicle, was subjected to a series of mechanical defects including overheating,

a clogged gas line, and improper brakes during the first month of ownership and thereafter cancelled the contract, the Court in holding that plaintiff was entitled to cancellation made the following observation: Id at 176

> "Once a person's faith is shaken in such a major investment as an automobile 'the vehicle loses not only its real value in their eyes, but becomes an instrument whose integrity is substantially impaired and whose operation is fraught with apprehension'". Zabriskie Chevrolet vs. Smith, supra at 40

The aforementioned liberal interpretation of the nebulous phrase "substantial impairment", was not unique to Illinois. Indeed in Durphy vs. Rod Baxter Imports, Inc., 262 N.W. 2d 349 (1978) the Court further liberalized and expanded the definition of "substantial impairment" by enacting this purely subjective test in deciding whether

or not there was substantial impairment. In the Rod Baxter case, the Court held that even if a defect is minor, if it substantially has shaken the faith of the buyer in its performance, cancellation is justified on a finding of substantial impairment (held:

> "Vehicle substantially impaired whereupon driving vehicle seat belt light buzzer activated, a rattle developed under the dashboard, a knob on a shift lever came off, and other defects manifested themselves notwithstanding the fact that they were ultimately fixed.")

See also Champion Ford Sales, Inc. vs. Levine, 49 N.D. App. 547, 433 A.2d 1218 (1981).

Finally in Testo vs. Russ Dunmire Oldsmobile, Inc., 16 Wash. App. 39, 554 P.2d 349 (1976), the Court held that if a defect was such that had the buyer been

aware of it prior to purchase, the vehicle would have lost all real value in his eyes, that the vehicle was substantially impaired regardless of whether or not an ordinary reasonable buyer in the open market would have declined to make a purchase under such circumstances.

The aforementioned rundown of the interpretation of the UCC term substantial impairment accorded by the States during the recent years no doubt evidences an intention to expand consumer protection. It is within this context that Magnuson-Moss was no doubt enacted.

Magnuson-Moss, Petitioner submits, was designed to streamline and simplify the requirements set forth in the UCC concerning notice and an opportunity to cure. Indeed, in the aforementioned cases as set forth above, there is no doubt the embodi-

ment of a very liberal interpretation of the applicable UCC provision codified in N.J.S.A. 12A:2-719(2) which states:

> "When circumstances cause an exclusive or limited warranty to fail of its essential purpose, remedy may be had as provided in this Act."

In none of the aforementioned cases was there a requirement that the buyer repeatedly return the vehicle in question to permit the manufacturer and/or dealer to cure the defect particularly where the buyer asserted with any justifiable basis that the manifestation of the defect undermined his confidence in the vehicle. In Ventura vs. Ford Motor Company, 180 N.J. Super. 45 (App. Div. 1981) the Court applied the aforementioned provision of the Uniform Commercial Code in holding that plaintiff was entitled to cancel the contract and receive damages based upon a

failure of the manufacturer to comply with its expressed obligation set forth in limited warranty, of maintaining and repairing, and that such failure constituted substantial impairment and breach of implied warranty of fitness for ordinary purposes per se. The Ventura Court's holding is based upon the unquestioned proposition that the expressed limited warranty is designed to protect the purchaser. Id at 53. As the Court said in Clark vs. International Harvester Company, 99 Idaho 326, 581 P.2d 784, 798 (1977):

> "The purpose of the exclusive repair and replacement remedy is to assure the purchaser receives a product which conforms to the expressed warranty, i.e. if the product is free from defects, and if the product proves defective within the warranty period, the seller is obligated to cure the defect within a reasonable time...

> if, however the seller is unable and unwilling to repair or replace a defective part within a reasonable time, the buyer is left with a defective product not conforming to the warranty and a limited remedy has not achieved its purpose... in such circumstances... the buyer (is allowed) to invoke the other remedies provided by the UCC if the defect substantially effects the value of the buyer's bargain."

Petitioner asserts that Magnuson-Moss constitutes the culmination of the evolving body of case law specifically creating a right of cancellation pursuant to 15 U.S.C. 2304(a)(4) under circumstances like the case sub judice. Petitioner need not establish, as the Courts below mistakenly assumed, that he gave Chrysler and Rossmeyer innumerable opportunities to cure the defects in question. Nor must he prove or establish, under Magnuson-Moss, that the defects in question where "substantial"

is an objective sense. Galanty, in order to invoke the Federal remedy, provided under Magnuson-Moss, need only establish that the vehicle failed to comply strictly with the warranty provisions extant. Nor do defendants' claim, that they fully and completely fixed the defects in question militate in favor of a different result where, as here, the vehicle no doubt had lost all value in Galanty's eyes.

The mere fortuity that the warranty in question is limited rather than full does not preclude Galanty from seeking the relief provided under Magnuson-Moss. The statutory scheme of Magnuson-Moss designed as it was to streamline, simplify and enhance the evergrowing state grounds for relief in the area of consumer protection from deceptive practices apply equally to the limited warranty. Significantly, no

where in the Act is there a specific provision which states to the contrary. We submit, that in light of the historical context in which the statutory scheme was enacted, the evergrowing body of State law enhancing consumer protection, the evil sought to be remedied, and the public interest involved, that the Court should interpret 15 U.S.C. 2304(a)(4) to permit Galanty to cancel the contract notwithstanding his apparent failure to establish substantial impairment and a breach of the implied warranty of merchantability.

Indeed Federal Courts confronted with the applicability of 15 U.S.C. 2304(a)(4) of Magnuson-Moss to limited warranties have begun to adopt this view. For example, in Pratt vs. Winebago, 463 F. Supp. 709 (W.D. Penn. 1979) plaintiff sought to invoke the remedy provided for under 15

U.S.C. 2304(a)(4) of cancellation and refund of the purchase price. The Pratt Court concluded that plaintiff had failed to show that the vehicle was substantially impaired pursuant to the UCC codified in Pennsylvania 12a P.R.S. PA Section 2-608 (1)(a). Additionally, the Court ruled that the plaintiff was not entitled to relief under Magnuson-Moss because they had failed to give the defendant any reasonable opportunity to repair the defect. The Pratt Court conceded that the statutory scheme under Magnuson-Moss permitted cancellation for any defect. Significantly, the Pratt Court made no distinction between a limited and full warranty in terms of the applicability of 15 U.S.C.A. 2304(a)(4) notwithstanding the fact that the plaintiff failed to prevail on his cause of action.

Perhaps the most significant case illustrative of Petitioner's point is Skelton vs. General Motors, 500 F. Supp. 1181 D.C. Ill. (1980) rev'd on other grounds, 660 F.2d. 311 (1980). In Skelton the Court held that a representation that a product would perform adequately constituted a written warranty justifying the invocation of remedies provided for under Magnuson-Moss because it involved a specific promise or affirmation. The Skelton Court noted that one of the major problems of Magnuson-Moss that it was poorly drafted and opaque the Court thereafter embarked upon an exhaustive discussion of the Legislative history in an effort to properly construe various innocuous portions of the statute.

Although not confronted with the identical situation before this Court, several as-

tute observations were made in analyzing the statute in question which supports Petitioner's notion that limited and full warranties are cloaked with the same protections and permit invocation of the remedies set forth in 15 U.S.C. 2304(a)(4). The Court noted that in order to constitute a warranty under Magnuson-Moss thus triggering Federal protections, certain separate and distinct requirements to that provided by the UCC must be met. This buttresses the conclusion that Congress was creating a new body of law whereever a written affirmation of fact or promise was made constituting a warranty under Magnuson-Moss, notwithstanding the question of whether or not it is a warranty for UCC purposes. The Skelton Court concluded therefore that with the additional and different requirements for a warranty came separate

and distinct obligations for the warrantor and remedies for the holder of the warranty.

With regard to the distinction between full and limited warranties, the Skelton Court summarily disregarded its importance: Id at 1186:

> "Section 103 of the Act, for example, requires that every written warranty conspicuously disclose whether it is 'full' or ' limited' as these terms are defined by the Act 15 U.S.C. 2302. Congress certainly did not intend that every written advertisement should indicate a conspicuous heading stating whether it is 'full' or 'limited'; In fact the terms do not make sense as applied to most advertising." (emphasis added) (See 15 U.S.C. 2304)

It is manifest from the aforementioned analysis as set forth in Skelton that Magnuson-Moss sought to cloak the consumers with all of the protections available under the Act whenever confronted with a promise or representation of quality regardless of

whether the warranty was limited or full. As *Skelton* makes clear, Magnuson-Moss has as its essential purpose both truth and expressed warranty disclosure. *Id.* Petitioner submits that this is not less true for limited warranties than full warranties.

Indeed in *Ventura vs. Ford Motor Company, supra* at 60, the Court properly notes that 15 U.S.C. 2303(a)(2) provides that all warranties that do not meet Federal minimum standards for warranties contained in 2304 should be conspicuously described as limited warranties. However, nowhere in the entire Act is there a suggestion that the remedies of 15 U.S.C. 2304(a)(4) are unavailable for those who are protected by limited rather than full warranties. Indeed *Ventura* notes that there is statutory silence in that regard. It follows *a fortiori* that some guidance is needed from this Court in an effort to interstitially

fill the gaps left by Congress in accord with the statutory purpose. It is our position that the key section of Magnuson-Moss which should serve as a guidepost in this Court's analysis is 15 U.S.C. 2308 which specifically precludes a warrantor, whether limited or full, from disclaiming any implied warranty of merchantability of fitness or otherwise, no doubt evidences the Legislature's intent as clearly articulated in Skelton to protect all potential consumers who are subject to warranty breaches which deprive them of the full value of their product.

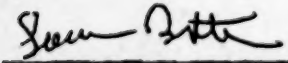
In light of the aforementioned we submit that Justice O'Hern was absolutely correct in his interpretation that 15 U.S.C. 2304(a)(4) applies equally to the situtation extant notwithstanding the mere fortuity that the warranty in question was "limited"

rather than "full". Petitioner submits that at present there is absolutely no consistency of application regarding this most important issue of public importance. The vague and duplicitous statutory language has created undue confusion, which we submit this Court should remedy. A proper resolution of the issues presented is essential to preserve and protect Petitioner's substantial rights as well as the rights of millions of potential consumers who might well be duped into purchasing a product only to find that the warrantor may hide behind rigid and mechanical and often arcane conflicting state statutory provisions and Court interpretations of the Uniform Commercial Code. Petitioner suffered grievous harm and this Court should remedy the error committed below.

CONCLUSION

For the foregoing reasons, Petitioner prays that a writ of certiorari issue to review the judgment and opinion of the Superior Court of New Jersey, Appellate Division, and New Jersey Supreme Court.

Respectfully submitted,



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NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-392-80T3

ROBERT GALANTY,

Plaintiff-Appellant,

vs.

CHRYSLER CORPORATION and
ROSSMEYER BROTHERS, INC.,

Defendants-Respondents.

Argued February 16, 1982-
Decided March 11, 1982

Before Judges Allcorn, Francis and
Morton I. Greenberg.

On appeal from Superior Court of New
Jersey, Chancery Division, Middlesex
County.

Mark R. Silber argued the cause for
the appellant.

Kenneth P. Westreich argued the cause
for the respondent Chrysler Corporation
(Conway, Reiseman, Bumgardner, Hurley &
Kleinfeld, attorneys).

John W. Spoganetz argued the cause for
the respondent Rossmeyer Brothers, Inc.
(Toolan, Romond, Abbott & Dominichetti,
attorneys).

PER CURIAM

The judgment of the Chancery Division is affirmed substantially for the reasons orally expressed by the trial judge. All issues of law raised on the appeal are clearly without merit. R.2:11-3(e)(1)(E). Adams v. Tramontin Motor Sales, 42 N.J. Super. 313 (App. Div. 1956).

Affirmed.

LAWRENCE BITTERMAN
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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-392-80

ROBERT GALANTY,

Plaintiff-Petitioner,

vs.

CHRYSLER CORPORATION and ROSSMEYER BROTHERS, INC.

Defendants-Respondents.

Civil Action

NOTICE OF PETITION FOR CERTIFICATION

TAKE NOTICE that the plaintiff, Robert Galanty, residing at 284 Kennedy Street, Iselin, New Jersey, petitions for certification to this Court from its judgment of March 11, 1982, which affirmed the Trial Court's directed verdict for defendants entered at the conclusion of plaintiff's case.

LAWRENCE BITTERMAN
Attorney for Plaintiff-Petitioner

/s/ Lawrence Bitterman
LAWRENCE BITTERMAN
Attorney for Plaintiff

SUPREME COURT OF NEW JERSEY
C-125 SEPTEMBER TERM 1982

19,692

ROBERT GALANTY,

Plaintiff-Petitioner,

vs.

ON PETITION
FOR CERTIFICATION

CHRYSLER CORPORATION and
ROSSMEYER BROTHERS, INC.,

Defendants-Respondents.

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-392-80 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is granted.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 28th day of September, 1982.

/s/ Stephen W. Townsend
Clerk

SUPREME COURT OF NEW JERSEY
A-89 September Term 1982
19,692

ROBERT GALANTY,

Plaintiff-Appellant,

vs.

ORDER

CHRYSLER CORPORATION and
ROSSMEYER BROTHERS, INC.,

Defendants-Respondents.

This matter having been duly considered and the Court having determined that certification was improvidently granted;

It is ORDERED that the within appeal be and hereby is dismissed.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 7th day of March, 1983.

/s/ Stephen W. Townsend
Clerk

Chief Justice Wilentz and Justices Clifford, Handler, Pollock and Garibaldi join in this order.

O'Hern, J., dissents from this Order. He believes that on a motion to dismiss under R. 4:37-2(b), viewing the evidence most favorably to plaintiff, plaintiff had clearly established a consumer

claim for breach of warranty under 15 U.S.C.A. 2304(a)(4) of the Magnuson-Moss Warranty Act. Dismissal of his claim was error calling for the supervision of this Court under R.2:12-4.

Justice Schreiber did not participate.

THE COURT: All right, insofar as the motions are concerned as I already indicated to Mr. Silber as he argued the point, the trouble I am having in this matter is assuming the correctness of his position, is the element of damages, and so far as punitive damages are concerned in this, the opinion of this Court, there isn't enough evidence to allow for such damages. Both Chrysler and Rossmeyer participated and cooperated to their best extent as I gathered from the testimony of the Plaintiff about twenty-five to thirty times and never was refused. He was not charged anything for whatever repair work they did. There is no indication that there was any malice on the part of either party in dealing with Mr. Galanty.

Chrysler responded to his complaints. They sent Mr. Koch down one or two occasions. Mr. Koch, in fact, in the presence of a consumer representative, and offered to do what they can do and authorized repairs and authorized Mr. Galanty to find an independent body worker and get an estimate and Mr. Koch was willing to cooperate to the greatest extent to cooperate to obtain payment of that estimate. For reasons of his own, which I don't understand, frankly, Mr. Galanty elected not to pursue that aspect of it. Why, I am at a loss to understand. Consequently, it is an indication that although the Defendants were trying to cooperate with him, apparently he was not giving his cooperation on the other end to the satisfaction of the warranty. Consequently, I see no cause for action for punitive damages as to either Defendant.

Insofar as recision is concerned, I see no reason for that cause of action to be maintained since the problems that developed, some of them as indicated by Mr. Galanty, were repaired, as I say, the body work they are willing to participate and see that he got that corrected. They are going to make an offer in that regard. As I say, Mr. Galanty refused to pursue that, and what we have left, the only complaint was the steering and the stalling as of today, and there is no evidence of defective steering as of June, 1980, just this year, and here it is almost four years since the purchase of the car. He did not find anyone to tell him what was wrong with the steering, if anything.

So far as the stalling is concerned, again, all we have is his testimony that the stalling, accepting that, assuming that that's so, and for the purposes of this

motion it is so. Nevertheless, there are no elements, no proof of the damage or compensatory damage, what it would cost to put that in good order. As I say, again, the problem with this case is I have no evidence whatsoever as to the damages that were suffered by Mr. Galanty; and, therefore, for me to make any award, assuming he is entitled to one, and at this posture, as I say, so far as the stalling is concerned, I will have to believe that. But, nevertheless, what can I award him? For me to make an award in that regard would be wrong and sheer speculation. For reasons I have given, I am going to dismiss the complaint against both Defendants with prejudice and not costs. You may have your evidence returned.

Office - Supreme Court, U.S.
FILED
JUN 29 1983
ALEXANDER L. STEVAS
CLERK

No. 82-2067

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

ROBERT GALANTY,

Petitioner,

vs.

CHRYSLER CORPORATION and
ROSSMEYER BROTHERS, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

BRIEF ON BEHALF OF RESPONDENT, CHRYSLER CORPORATION IN OPPOSITION TO THE PETITION FOR CERTIORARI

GEORGE R. HARDIN, Esq.
Bumgardner, Hardin, & Ellis
50 Park Place
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(201) 624-8555
Attorneys for Respondent,
Chrysler Corporation

CHRYSLER CORPORATION owns a 15% interest in Peugot, S.A.; a 15% interest in Mitsubishi Motors Corp.; and, a 99.4% interest in Chrysler de Mexico. In addition, Chrysler Corporation owns a controlling interest in numerous dealerships under an investment program to provide initial capital for dealers. For the information of the Court, Chrysler Financial Corporation is a wholly owned subsidiary of Chrysler Corporation. Chrysler Financial Corporation owns and operates Chrysler Credit Corporation which engages in retail and wholesale financing of automobiles.

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TABLE OF AUTHORITIES CITED

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COUNTERSTATEMENT OF OPINIONS IN THE COURTS BELOW

On March 7, 1983, the Supreme Court of New Jersey dismissed plaintiff's appeal and determined that certification was "improvidently granted" thirteen days after hearing oral argument of counsel. (PA5).

On March 11, 1982, the Superior Court of New Jersey, Appellate Division, affirmed the trial court in a two sentence per curiam opinion which found the issues of law raised on appeal to be "clearly without merit". (PA2).

On or about August 25, 1980, the trial court, after hearing all of plaintiff's evidence which consisted solely of his own testimony, dismissed plaintiff's case for insufficient proofs. (PA9).

COUNTERSTATEMENT OF JURISDICTION

There is no basis for United States Supreme Court Jurisdiction. The case

involves the sufficiency of proofs adduced at trial. The courts below recognized the applicability of the Magnuson-Moss Act, independent of the Uniform Commercial Code, but found the proofs insufficient to establish a defect in the product or a breach of warranty. Therefore, there is no question involving an interpretation of federal statute in this case.

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether plaintiff adduced sufficient proofs at trial to establish a defect in the subject automobile and a factual basis for breach of warranty.

COUNTERSTATEMENT OF THE CASE

Plaintiff petitions for certiorari from a determination by the trial court, the appellate division of the Superior Court of New Jersey and the Supreme Court

of New Jersey, the highest state court, that his proofs were insufficient to establish a factual basis for his alleged cause of action for breach of warranty. In each instance, the plaintiff had an opportunity to present oral argument before the respective courts and to muster all available proofs which he contended supported his position. In each instance, the dismissal entered by the trial court was sustained and plaintiff's argument dismissed as clearly without merit.

The proofs at trial disclosed that on September 1, 1976, plaintiff purchased a 1976 Plymouth Sport Fury from the co-respondent, Rossmeyer Brothers, Inc. (Rossmeyer). This automobile was manufactured by the respondent, Chrylser Corporation (Chrysler). The purchase price was $5,407.50.

Plaintiff operated this automobile from the date of purchase through August 25,

1980 (the date of trial) and by that time the automobile had been driven over 56,000 miles. While plaintiff complained of various cosmetic problems, upon cross examination he conceded that all problems with the vehicle had been corrected with the exception of his complaints regarding steering and occasional stalling. However, plaintiff's testimony indicated that he had taken the vehicle to various mechanics complaining of the steering problem and in each instance they advised him that the steering was functioning properly and could not verify a problem with this function. As a result, at the conclusion of plaintiff's proofs, there remained solely his complaint of an occasional stalling problem in a vehicle which had been driven 56,000 miles. There was no proofs with respect to the cause of the alleged stalling, the measure of compensatory damages, nor of a defect or any

substantial impairment of the use of the vehicle.

In contrast, the plaintiff acknowledged that Chrysler had offered to permit him to obtain an estimate for all repair work from an independent automobile garage and to have the automobile repaired by the mechanic of his choice at no cost to the plaintiff. However, for reasons which he would not express at trial, the plaintiff declined this offer and instead presented Chrysler with an altered estimate. As of the time this matter was argued before the Supreme Court of New Jersey, on February 22, 1983, there was an indication by plaintiff's counsel that he may still be operating this vehicle.

There was never a holding nor a discussion by any court below involving the applicability of the Magnuson-Moss Warranty Act (15 U.S.C. 2301) nor suggesting that this statute did not afford an

additional remedy separate and distinct from the Uniform Commercial Code as suggested in plaintiff's statement of the question presented. New Jersey clearly recognizes the separate relief afforded by the Act and the instant case involves solely an issue of the sufficiency of plaintiff's proofs to support his alleged breach of warranty. Even the sole dissenting Justice of the New Jersey Supreme Court based his very brief dissent on his view of the sufficiency of the evidence adduced at trial to prove a breach of warranty. There was never any question but that the Magnuson-Moss Act created a remedy separate and distinct from the Uniform Commercial Code and this was never an issue in this case.

REASON FOR DENYING CERTIORARI

New Jersey fully recognizes and applies the Magnuson-Moss Warranty Act

consistent with federal law and enforces the causes of action and remedies afforded therein separate and apart from whatever causes of action may exist under the Uniform Commercial Code. Ventura v. Ford Motor Company, 173 N.J. Super 501, 414 A.2d 611 (Ch. Div. 1980), affirmed 180 N.J. Super 45, 433 A2d 801 (App. Div. 1981). Accordingly, the federal question proposed by the plaintiff-appellant does not exist. In order for plaintiff to establish a cause of action under the Magnuson-Moss Act, he must first establish a breach of warranty which he was unable to do as a result of the insufficiency of his proofs in this case.

CONCLUSION

For the foregoing reasons, Respondent Chrysler Corporation respectfully requests and prays that plaintiff's Petition for

a Writ of Certiorari be denied.

Respectfully submitted,

BUMGARDNER, HARDIN & ELLIS

By: _____

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